

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S  
SUPPLEMENTAL  
APPENDIX**



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**74-2287**

HAROLD A. LIPTON and IRVING H. LEVIN,

Appellants,

-against-

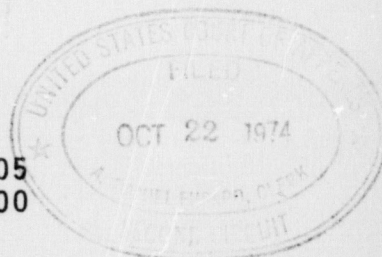
ROBERT J. SCHMERTZ,

Appellee.

ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S SUPPLEMENTAL APPENDIX

REAVIS & McGRATH  
Attorneys for Appellee  
Office and P.O. Address  
1 Chase Manhattan Plaza  
New York, New York 10005  
Telephone: (212) 269-2600



PAGINATION AS IN ORIGINAL COPY

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AFFIDAVIT OF JAMES NESPOLE, SWORN TO  
SEPTEMBER 24, 1974 - IN SUPPORT OF  
AN APPLICATION FOR AN ORDER TO SHOW  
CAUSE AND A TEMPORARY RESTRAINING ORDER

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

HAROLD A. LIPTON and IRVING  
LEVIN,

Plaintiffs,

-against-

ROBERT J. SCHMERTZ,

Defendant.

---

STATE OF NEW YORK )  
                          :    ss.:  
COUNTY OF NEW YORK )

JAMES NESPOLE, being duly sworn, deposes  
and says:

1. I am an associate of the firm of  
Reavis & McGrath, attorneys for the defendant in the  
above-captioned action, and am fully familiar with  
the facts set forth herein. I submit this affidavit  
in support of Defendant's application for a Temporary  
Restraining Order and an Order to Show Cause why the  
registration in this Court of a judgment entered in  
the United States District Court, Central District  
of California obtained by plaintiffs should not be  
stricken. The ground for this application is that

AFFIDAVIT OF JAMES NESPOLE, SWORN TO  
SEPTEMBER 24, 1974 - IN SUPPORT OF  
AN APPLICATION FOR AN ORDER TO SHOW  
CAUSE AND A TEMPORARY RESTRAINING ORDER

an appeal from said judgment is pending and therefore the judgment cannot be registered in this Court.

2. On or about June 8, 1973, plaintiffs herein brought an action for breach of contract in the United States District Court, Central District of California. On July 25, 1974, a judgment therein was entered for the plaintiffs in the amount of \$4,221.047.57.

3. On August 21, 1974, an appeal from said judgment was taken, and a Notice of Appeal was duly filed with the Clerk of the United States District Court, Central District of California. Said appeal is still pending.

4. On September 11, 1974, plaintiffs registered a Certification of said judgment with the Clerk of this Court (a copy of the Certification is annexed hereto as Exhibit "A"). The registration of the judgment was in clear violation of 28 U.S.C.D. §1963 (1958). The statute provides that only a final judgment - one not on appeal - can be registered in this Court. The operative language of the statute is that a judgment "...which has become final by appeal or expiration of time for appeal may be

AFFIDAVIT OF JAMES NESPOLE, SWORN TO  
SEPTEMBER 24, 1974 - IN SUPPORT OF  
AN APPLICATION FOR AN ORDER TO SHOW  
CAUSE AND A TEMPORARY RESTRAINING ORDER

registered..." The plaintiffs have acted with complete disregard for the statute. The Clerk of the California Court's Certification of the judgment clearly states that "...a notice of appeal from said judgment was filed in my office on August 12, 1974", but the Certification does not state that the appeal has been determined or dismissed as is required and nor could it since the appeal is still pending.

5. The plaintiffs' violation of §1963 has harassed and embarrassed the defendant in the operation of his financial affairs. Plaintiffs, in an attempt to execute here in New York on a non-final judgment, have served 3 Restraining Notices (with Information Subpoenas). On September 13, 1974, a Restraining Notice was served on Morgan Guaranty Trust Company, and a Restraining Notice was served on the New York Stars. Copies of said Restraining Notices are annexed hereto as Exhibits "B" and "C", respectively. Also, on September 16, 1974 a Restraining Notice and Information Subpoena was served on the New York office of The First National Bank of Boston.

AFFIDAVIT OF JAMES NESPOLE, SWORN TO  
SEPTEMBER 24, 1974 - IN SUPPORT OF  
AN APPLICATION FOR AN ORDER TO SHOW  
CAUSE AND A TEMPORARY RESTRAINING ORDER

6. The plaintiffs' misuse of the registration process has greatly prejudiced the defendant. For example, in a letter dated September 17, 1974, Morgan Guaranty Trust Company advised the defendant that it had placed "an embargo" on the funds in the defendant's account therein in the amount of \$8,442,095.14, twice the amount of plaintiffs' judgment. A copy of Morgan Guaranty's letter is attached hereto as Exhibit "D".

7. If the plaintiffs are allowed to improperly execute on the judgment while an appeal is pending the defendant will suffer irreparable injury.

8. No previous request for the relief sought herein has been made.

WHEREFORE, I respectfully request that upon the hearing of the instant motion that plaintiffs' registration of the California judgment be stricken, and that pending the hearing of this motion a temporary restraining order be entered restraining the plaintiffs from further attempting to execute on said judgment or in any other way interfere with

AFFIDAVIT OF JAMES NESPOLE, SWORN TO  
SEPTEMBER 24, 1974 - IN SUPPORT OF  
AN APPLICATION FOR AN ORDER TO SHOW  
CAUSE AND A TEMPORARY RESTRAINING ORDER

defendant's property, and that this Court grant  
such further relief as it deems just and proper.

s/\_\_\_\_\_  
James Nespole

[Duly sworn to  
September 24, 1974.]

EXHIBIT A - CERTIFICATION OF CALIFORNIA JUDGMENT -  
ANNEXED TO AFFIDAVIT OF JAMES NESPOLE

CERTIFICATION OF JUDGMENT

CIV 131 (4-73)

United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

M 18-302

HAROLD A. LIPTON and  
IRVING H. LEVIN,

CIVIL ACTION FILE NO. 73-1303-R

Plaintiffs,

vs.

ROBERT J. SCHMERTZ,

Defendant.

JUDGMENT

# 74, 737

CERTIFICATION OF JUDGMENT FOR  
REGISTRATION IN ANOTHER DISTRICT

I, EDWARD M. KRITZMAN, Clerk of the United States District Court for  
the Central District of California

do hereby certify the annexed to be a true and correct copy of the original judgment entered in the  
above entitled action on July 25, 1974, as it appears of record in my office,  
and that

\* a notice of appeal from said judgment was filed in my office  
on August 12, 1974. To date, no stay of execution of said  
judgment has been filed or entered.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said  
Court this 5th day of September, 1974.

By [Signature], Clerk  
Deputy Clerk

\* When no notice of appeal from the judgment has been filed, insert "no notice of appeal from the said judgment  
has been filed in my office and the time for appeal commenced to run on [insert date] upon the entry of [If no motion  
of the character described in Rule 72(a) F.R.C.P. was filed, here insert 'the judgment', otherwise describe the  
nature of the order from the entry of which time for appeal is computed under that rule.] If an appeal was taken,  
insert "a notice of appeal from the said judgment was filed in my office on [insert date] and the judgment was  
affirmed by mandate of the Court of Appeals issued [insert date]" or "a notice of appeal from the said judgment  
was filed in my office on [insert date] and the appeal was dismissed by the [insert 'Court of Appeals' or 'District  
Court'] on [insert date]", as the case may be.

CSA DC 73-3097

29 || sum of \$500,000;

30 ||

EXHIBIT A - JUDGMENT ON THE VERDICT (FOR PLAINTIFFS) -  
ATTACHED TO CERTIFICATION OF CALIFORNIA  
JUDGMENT - ANNEXED TO AFFIDAVIT  
OF JAMES NESPOLE

STUART A. BENJAMIN  
A Member of the

WYMAN, BAUTZ, ROSEMAN & RUCHEL  
6001 WILSHIRE BOULEVARD, SUITE 703  
BEVERLY HILLS, CALIFORNIA 90210  
CALISTVIEW 3-1000 - TRUNK 3-1000

Attorneys for Plaintiffs ENTERED

(SPACE BELOW FOR FILING STAMP ONLY)

FILED

JUL 25 1974

JUL 25 1974

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
By *[Signature]* CLERK, U. S. DISTRICT COURT  
DEPUTY CENTRAL DISTRICT OF CALIFORNIA  
By *[Signature]* DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HAROLD A. LIPTON and  
IRVING H. LEVIN,

Plaintiffs,

vs.

ROBERT J. SCHMERTZ,

Defendant.

CASE NO. 73-1303-R

JUDGMENT ON THE VERDICT  
(FOR PLAINTIFFS)

This case having been tried by the Court and a Jury,  
before the Honorable Manuel L. Real, Jr., judge presiding, and  
the issues having been duly tried, and the Jury having duly  
rendered its verdict; now therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that defendant,  
ROBERT J. SCHMERTZ, pay to plaintiffs, HAROLD A. LIPTON and  
IRVING H. LEVIN, compensatory damages in the sum of \$250,000,  
plus interest at the rate of 7% from August 7, 1972, in the amount  
of \$34,232.87, plus compensatory damages in the sum of \$3,435,000;  
and that defendant, ROBERT J. SCHMERTZ, pay to plaintiffs,  
HAROLD A. LIPTON and IRVING H. LEVIN, punitive damages in the  
sum of \$500,000;


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EXHIBIT A - JUDGMENT ON THE VERDICT (FOR PLAINTIFFS) -  
 ATTACHED TO CERTIFICATION OF CALIFORNIA  
 JUDGMENT - ANNEXED TO AFFIDAVIT  
 OF JAMES NESPOLE

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said  
 plaintiffs, HAROLD A. LIPTON and IRVING H. LEVIN, have and recover  
 costs from the said defendant, ROBERT J. SCHWARTZ, taxed in the  
 sum of \$1,814.22.  
 Dated: July 22, 1974.

  
 United States District Court Judge

7/31/74 taxed costs in sum of \$1,814.22 against Def.

NOTED FOR THE COURT  
 JAMES NESPOLE, CLERK OF COURT  
 COUNTY OF LOS ANGELES, CALIFORNIA  
 COUNTY NEW 2-1000 - TENDON 10010

I hereby affirm and certify on  
 that the foregoing document is a full, true and correct  
 copy of the original as filed in my office and in my  
 legal custody.

AUG 28 1974

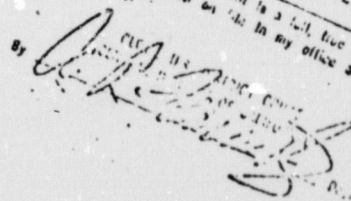


EXHIBIT A - JUDGMENT ON THE VERDICT (FOR PLAINTIFFS) -  
ATTACHED TO CERTIFICATION OF CALIFORNIA  
JUDGMENT - ANNEXED TO AFFIDAVIT  
OF JAMES NESPOLE

Robert F. Heston  
Attorney for Defendant  
185 Madison Ave  
N.Y. N.Y. 10016  
(212) 735-0001

EXHIBIT B - RESTRAINING NOTICE AND INFORMATION  
SUBPOENA, SERVED ON MORGAN GUARANTY  
TRUST COMPANY - ANNEXED TO AFFIDAVIT  
OF JAMES NESPOLE

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

HAROLD A. LIPTON and IRVING H. LEVIN,

Plaintiff,

vs.

ROBERT J. SCHMERTZ,

Defendant

INFORMATION SUBPOENA  
AND  
RESTRAINING NOTICE

Judgment No. 74,733

IN THE NAME OF THE PEOPLE OF THE UNITED STATES OF AMERICA: GREETING:

TO: First National Bank of Boston 2 Wall Street New York, New York

WHEREAS in an action in the United States District Court for the Central District of California, Civil Action File No. 73-1303-R, between HAROLD A. LIPTON and IRVING H. LEVIN, as Plaintiffs, and ROBERT J. SCHMERTZ as Defendant, who are all the parties named in said action, a judgment was entered on July 25, 1974 in favor of HAROLD A. LIPTON and IRVING H. LEVIN, judgment creditors and against ROBERT J. SCHMERTZ, judgment debtor, in the amount of \$4,221,047.57, of which \$4,221,047.57, together with interest thereon from July 25, 1974 remains due and unpaid; and

WHEREAS, it appears that you owe a debt to the judgment debtor or are in possession or in custody of property in which the judgment debtor has an interest, including but not meant in any way to limit the effect of this restraining notice:

Bank account; interest of the judgment debtor in the Boston Celtics Basketball Team; interest of the debtor in New England Whaler, a World Hockey Team; the judgment debtor's stock interest in Leisure Technology Corporation.

NOW THEREFORE, we command you that you answer in writing under each question annexed to this subpoena as Schedule "A", and that you return the original within seven days after your receipt of this subpoena. Please take notice that swearing or failure to comply with this subpoena is punishable as a contempt of Court.

TAKE NOTICE that pursuant to subdivision (b) of Section 5222 of the Civil Practice Law and Rules, which is set forth in full herein, you are hereby forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property or pay over or otherwise dispose of any such debt except as therein provided.

TAKE FURTHER NOTICE that this notice also covers all property in which the judgment debtor has an interest hereafter coming into your possession or custody, and all debts hereafter coming due from you to the judgment debtor.

## CIVIL PRACTICE LAW AND BOOKS

11a

EXHIBIT B - RESTRAINING NOTICE AND INFORMATION  
SUBPOENA, SERVED ON MORGAN GUARANTY  
TRUST COMPANY - ANNEXED TO AFFIDAVIT  
OF JAMES NESPOLE

SCHEDULE "A"

QUESTIONS AND ANSWERS

STATE OF NEW YORK: COUNTY OF

being duly  
sworn, deposes and says: That deponent is the recipient  
of the information subpoena and restraining notice, and  
the original and copy of questions accompanying said subpoena.  
The answers set forth below are made from information  
obtained from the records of the recipient:

Q. 1. Are you holding any sums to which the judgment  
debtor is entitled, and if so, set forth the  
amount thereof in your possession and the  
source thereof.

A.

Q. 2. Are you holding any property belonging to the  
judgment debtor, and if so, describe in detail  
the said property and the source thereof.

A.

Q. 3. Do you have a record of any property or bank  
account in which the judgment debtor may have  
an interest, whether under the name of the  
judgment debtor, under a trade or corporate name,  
or in association with others, as of the date of  
this subpoena or within one year prior thereto?

A.

Q. 4. Is the judgment debtor indebted to you, and if so,  
set forth the amount thereof and the day or date the  
indebtedness was first incurred?

A.

Q. 5. In connection with any indebtedness as may be  
set forth in Question 4 above, have any payments  
been made six months prior to this subpoena;  
giving the dates payment was made and the amounts th

A.

Q. 6. Has the Judgment Debtor ever provided you with personal  
financial statements, and if so, give the dates there

A.

Sworn to before me this  
day of

, 1974  
12a

EXHIBIT B - RESTRAINING NOTICE AND INFORMATION  
SUBPOENA, SERVED ON MORGAN GUARANTY  
TRUST COMPANY - ANNEXED TO AFFIDAVIT  
OF JAMES NESPOLE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

HAROLD A. LIPTON and IRVING  
H. LEVIN,

Plaintiffs,

- against -

ROBERT J. SCHMERTZ,

Defendant

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INFORMATION SUBPOENA  
AND  
RESTRAINING NOTICE

---

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ROBERT P. HERZOG

ATTORNEY FOR Judgment Creditors

OFFICE AND POST OFFICE ADDRESS

183 MADISON AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10016

(212) 723-0001

EXHIBIT C - RESTRAINING NOTICE AND INFORMATION  
SUBPOENA, SERVED ON THE NEW YORK STARS -  
ANNEXED TO AFFIDAVIT OF JAMES NESPOLE

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X  
HAROLD A. LIPTON and IRVING H. LEVIN,

Plaintiff,

vs.

ROBERT J. SCHMERTZ,

Defendant  
-----X

INFORMATION SUBPOENA  
AND  
RESTRAINING NOTICE

Judgment No. 74,733

IN THE NAME OF THE PEOPLE OF THE UNITED STATES OF AMERICA: GREETING:

TO: New York Stars 415 Madison Avenue New York, New York

WHEREAS in an action in the United States District Court for the Central District of California, Civil Action File No. 73-1303-R, between HAROLD A. LIPTON and IRVING H. LEVIN, as Plaintiffs, and ROBERT J. SCHMERTZ, as Defendant, who are all the parties named in said action, a judgment was entered on July 25, 1974 in favor of HAROLD A. LIPTON and IRVING H. LEVIN, judgment creditors and against ROBERT J. SCHMERTZ, judgment debtor, in the amount of \$4,221,047.57, of which \$1,221,047.57, together with interest thereon from July 25, 1974 remains due and unpaid; and

WHEREAS, it appears that you owe a debt to the judgment debtor or are in possession or in custody of property in which the judgment debtor has an interest, including but not meant in any way to limit the effect of this restraining notice:

Interest of judgment debtor in World Football League,  
arising from his 100% ownership of the New York Stars.

NOW THEREFORE, we command you that you answer in writing under oath each question annexed to this subpoena as Schedule "A", and that you return the original within seven days after your receipt of this subpoena. Please take notice that false swearing or failure to comply with this subpoena is punishable as a contempt of Court.

TAKE NOTICE that pursuant to subdivision (b) of Section 5222 of the Civil Practice Law and Rules, which is set forth in full herein, you are hereby forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property or pay over or otherwise dispose of any such debt except as therein provided.

TAKE FURTHER NOTICE that this notice also covers all property in which the judgment debtor has an interest hereafter coming into your possession or custody, and all debts hereafter coming due from you to the judgment debtor.

EXHIBIT C - RESTRAINING NOTICE AND INFORMATION  
SUBPOENA, SERVED ON THE NEW YORK STARS -  
ANNEXED TO AFFIDAVIT OF JAMES NESPOLE

CIVIL PRACTICE LAW AND RULES

Section 5022(b) Effect of restraint; prohibition of transfer; duration.

A judgment debtor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor is effective only if, at the time of service, he owes a debt to the judgment debtor or he is in the possession or custody of property in which he knows or has reason to believe the judgment debtor has an interest, or if the judgment creditor has stated in the notice that a specified debt is owed by the person served to the judgment debtor or that the judgment debtor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him, or until the judgment is satisfied or vacated, whichever event first occurs. A judgment creditor who has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor in an amount equal to twice the amount due on the judgment, the restraining notice is not effective as to other property or money.

TAKE FURTHER NOTICE that disobedience of this Restraining Notice is punishable as a contempt of court.

Dated: New York, New York  
September 11, 1974

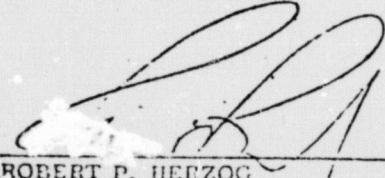
  
ROBERT P. HERZOG  
Attorney for Judgment Creditors  
185 Madison Avenue  
New York, New York 10016  
(212) 725-0001

EXHIBIT C - RESTRAINING NOTICE AND INFORMATION  
SUBPOENA, SERVED ON THE NEW YORK STARS -  
ANNEXED TO AFFIDAVIT OF JAMES NESPOLE

SCHEDULE "A"

QUESTIONS AND ANSWERS

STATE OF NEW YORK: COUNTY OF

being duly  
sworn, deposes and says: That deponent is the recipient  
of the information subpoena and restraining notice, and  
the original and copy of questions accompanying said subpoena.  
The answers set forth below are made from information  
obtained from the records of the recipient:

Q. 1. Are you holding any sums to which the judgment  
debtor is entitled, and if so, set forth the  
amount thereof in your possession and the  
source thereof.

A.

Q. 2. Are you holding any property belonging to the  
judgment debtor, and if so, describe in detail  
the said property and the source thereof.

A.

Q. 3. Do you have a record of any property or bank  
account in which the judgment debtor may have  
an interest, whether under the name of the  
judgment debtor, under a trade or corporate name,  
or in association with others, as of the date of  
this subpoena or within one year prior thereto?

A.

Q. 4. Is the judgment debtor indebted to you, and if so, set  
forth the amount thereof and the day or date the  
indebtedness was first incurred?

A.

Q. 5. In connection with any indebtedness as may be  
set forth in Question 4 above, have any payments  
been made six months prior to this subpoena;  
giving the dates payment was made and the amounts there

A.

Q. 6. Has the Judgment Debtor ever provided you with personal  
financial statements, and if so, give the dates thereof

A.

Sworn to before me this  
day of

, 1974

EXHIBIT C - RESTRAINING NOTICE AND INFORMATION  
SUBPOENA, SERVED ON THE NEW YORK STARS -  
ANNEXED TO AFFIDAVIT OF JAMES NESPOLE

Index No. 74,733 Year 19

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

HAROLD A. LIPTON and IRVING  
H. LEVIN,

Plaintiffs,

- against -

ROBERT J. SCHMERTZ,

Defendant

---

---

INFORMATION SUBPOENA  
AND  
RESTRAINING NOTICE

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ROBERT P. HERZOG

ATTORNEY FOR Judgment Creditors

OFFICE AND POST OFFICE ADDRESS

183 MADISON AVENUE

BOROUGH OF MANHATTAN NEW YORK, N. Y. 10016

(212) 721-0001

EXHIBIT D - LETTER DATED SEPTEMBER 17, 1974 FROM  
MORGAN GUARANTY TRUST COMPANY TO  
ROBERT J. SCHMERTZ - ANNEXED TO  
AFFIDAVIT OF JAMES NESPOLE

RECEIVED

SEP 19 1974

MORGAN GUARANTY TRUST COMPANY  
OF NEW YORK

23 WALL STREET, NEW YORK, N.Y. 10025

JOHN C. GIORDANO.

*New York*

September 17, 1974

THOMAS J. McMANUS  
Assistant Resident Counsel

Mr. Robert J. Schmertz  
Leisure Technology Corporation  
1 Airport Road  
Lakewood, New Jersey 08701

Re: Harold A. Lipton and Irving H. Levin, Plaintiffs  
vs.  
Robert J. Schmertz, Defendant

Dear Mr. Schmertz:

This is to inform you that on September 13, 1974, there was served upon us a Restraining Notice in the above matter on a judgment which the Notice states was entered against you on July 25, 1974 in the sum of \$4,221,047.57 and pursuant to the injunctive provisions of the Notice we have placed an embargo against funds now in your account and hereafter in your account in the amount of \$8,442,095.14, which is twice the amount of the judgment.

The attorney for the plaintiffs is Robert P. Herzog, 185 Madison Avenue, New York, New York 10016.

Very truly yours,

*Thomas J. McManus*

COMPLAINT IN MASSACHUSETTS ACTION

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO.

\* \* \* \* \*

HAROLD A. LIPTON and  
IRVING H. LEVIN,

Plaintiffs,

vs.

COMPLAINT

ROBERT J. SCHMERTZ, FIRST  
NATIONAL BANK OF BOSTON,  
BOSTON CELTICS BASKETBALL  
CLUB, INC.,

Defendants. \*

\* \* \* \* \*

To the Honorable, the Justices of the Superior Court,  
holden in and for the County of Suffolk, this is a complaint  
seeking to enforce and satisfy a judgment, rendered in the United  
States District Court for the Central District of California, after  
a jury verdict on an action of contract, by reaching and applying  
the judgment debtor's interest in and to his capital stock owner-  
ship in various corporations, and for injunctive relief pending  
same.

1. The plaintiffs HAROLD A. LIPTON and IRVING H. LEVIN  
are citizens of the State of California, both residing in the County  
of Los Angeles.

2. The defendant ROBERT J. SCHMERTZ ("SCHMERTZ") is a  
citizen of New Jersey, residing in the City of Lakewood, and is an  
officer, director and stockholder of Massachusetts corporations,  
with offices in the City of Boston.

////

COMPLAINT IN MASSACHUSETTS ACTION

1           3.    The defendant FIRST NATIONAL BANK OF BOSTON ("BANK")  
2    is a nationally chartered banking institution, with its principal  
3    place of business in the City of Boston in this Commonwealth.

4           4.    The defendant BOSTON CELTICS BASKETBALL CLUB, INC.  
5    ("CELTICS") is a Massachusetts corporation, with its principal  
6    office and place of business in the City of Boston within this  
7    Commonwealth.

8           5.    Jurisdiction herein is founded upon G. L. c.214,  
9    §3 cl. 8, Rule 65 of the Massachusetts Rules of Civil Procedure  
10   and the general equity and legal jurisdiction of this Court.

11           6.    On July 25, 1974, after a full jury trial on  
12   the merits in the United States District Court for the Central  
13   District of California, docket number 73-1303-R, concerning a dis-  
14   puted agreement between the plaintiffs and SCHMERTZ over the sale  
15   of the CELTICS, the plaintiffs obtained a judgment, with interest  
16   and costs, in the total sum, as amended, of \$3,936,814.70 (more  
17   fully explained in the news clipping attached hereto as Exhibit A);  
18   that although an appeal has been filed and is pending, the execu-  
19   tion of said judgment has not been stayed and is a final judgment  
20   in full force and effect, as duly appears in the records of said  
21   Court, and as evidenced by a Certificate of Judgment from the  
22   Deputy Clerk of said Court which is attached hereto as Exhibit B.

23           7.    The Federal Court issuing said judgment had juris-  
24   diction over the parties and subject matter.

25           8.    SCHMERTZ is indebted to the plaintiffs in the sum  
26   of \$3,936,814.70, the amount of said judgment which has not been  
27   satisfied in full or in part.

28    ////

COMPLAINT IN MASSACHUSETTS ACTION

1 9. According to affidavits filed in the California  
2 suit by SCHMERTZ, copies of which have been provided ~~to~~ the plain-  
3 tiffs, SCHMERTZ is chief operating officer and the owner of shares  
4 of stock in various corporations, all of which shares are pledged  
5 to the defendant BANK as collateral for loans made to him, as  
6 follows:

7 (a) CELTICS: 100% stockholder.

8 (b) LEISURE TECHNOLOGY CORPORATION: a publicly  
9 held company, 55% stockholder, all shares  
10 of which stock are restricted from freely  
11 being traded as so called "lettered" stock.

12 (c) NEW ENGLAND PROFESSIONAL HOCKEY, INC.,  
13 d/b/a NEW ENGLAND WHALERS: a Massachusetts  
14 corporation, 60% stockholder.

15 10. All of the aforesaid stock has been pledged to the  
16 BANK for loans in the sum of approximately \$6,000,000.00 and  
17 SCHMERTZ is unable to obtain a bond or raise other collateral to  
18 stay and secure the aforesaid judgment pending his appeal, pursu-  
19 ant to affidavits filed by him in the California suit.

20 11. SCHMERTZ has encumbered ownership interests in other  
21 professional athletic teams and, upon information and belief, he  
22 has incurred financial obligations in connection therewith.

23 12. Upon information and belief, there are no other  
24 assets in this Commonwealth nor are there sufficient assets in any  
25 other State which can be reached and applied to satisfy said judg-  
26 ment, or any judgment on same recovered herein, and the plaintiffs  
27 would be irreparably harmed if the defendants were not enjoined  
28 from transferring or otherwise disposing of or further encumbering  
said stock referred to in Paragraph 9, and presently in the custody  
of the defendant BANK, and all or substantially all of the assets

COMPLAINT IN MASSACHUSETTS ACTION

1 owned by the CELTICS and NEW ENGLAND PROFESSIONAL HOCKEY, INC.,  
2 d/b/a NEW ENGLAND WHALERS, both of which corporations are con-  
3 trolled by SCHMERTZ.

4 WHEREFORE, the plaintiffs pray for the following relief:

5 1. The defendant FIRST NATIONAL BANK OF BOSTON, its  
6 agents, attorneys and servants be temporarily restrained from  
7 selling, transferring, further encumbering or otherwise disposing  
8 of or alienating the shares of stock in its custody and belonging  
9 to the defendant ROBERT J. SCHMERTZ in and to the BOSTON CELTICS  
10 BASKETBALL CLUB, INC., LEISURE TECHNOLOGY CORPORATION and NEW  
11 ENGLAND PROFESSIONAL HOCKEY, INC., d/b/a NEW ENGLAND WHALERS until  
12 further order of the Court.

13 2. The defendant BOSTON CELTICS BASKETBALL CLUB, INC.,  
14 its agents, attorneys and servants, be temporarily restrained from  
15 transferring, encumbering or, in any way, alienating the stock of  
16 said corporation which, on its books and records, is owned by the  
17 defendant ROBERT J. SCHMERTZ, and all or substantially all of the  
18 assets owned by the BOSTON CELTICS BASKETBALL CLUB, INC., until  
19 further order of the Court.

20 3. The defendant ROBERT J. SCHMERTZ, his agents,  
21 attorneys and servants be temporarily restrained from selling,  
22 transferring, further encumbering or, in any other way, disposing  
23 of or alienating his capital stock in and to the BOSTON CELTICS  
24 BASKETBALL CLUB, INC., LEISURE TECHNOLOGY CORPORATION and NEW  
25 ENGLAND PROFESSIONAL HOCKEY, INC., d/b/a NEW ENGLAND WHALERS, and  
26 all or substantially all of the assets owned by the BOSTON CELTICS  
27 BASKETBALL CLUB, INC. and NEW ENGLAND PROFESSIONAL HOCKEY, INC.,

28 ////

COMPLAINT IN MASSACHUSETTS ACTION

1 d/b/a NEW ENGLAND WHALERS, both of which corporations are controlled  
2 by ROBERT J. SCHMERTZ, until further order of the Court.

3 4. The temporary restraining orders in prayers 1 through  
4 3 be continued as preliminary injunctions until a hearing on the  
5 merits or until further order of the Court.

6 5. The Court enter judgment for the plaintiffs in the  
7 amount of \$3,936,814.70, with interest from the date of this suit,  
8 and costs.

9 6. The Court appoint a Commissioner, Master or Receiver  
10 to determine the value of the shares of stock owned by the defen-  
11 dant ROBERT J. SCHMERTZ and held by the defendant FIRST NATIONAL  
12 BANK OF BOSTON, determine the FIRST NATIONAL BANK OF BOSTON's  
13 interest therein, sell or otherwise transfer for value said stock  
14 and reach and apply the proceeds thereof to discharge the obliga-  
15 tions of ROBERT J. SCHMERTZ to the FIRST NATIONAL BANK OF BOSTON  
16 and to apply any excess proceeds therefrom to the satisfaction of  
17 the judgment for the plaintiffs; or, for such other application or  
18 disposition of said stock as the Court deems fair and just.

19 ////

20 ////

21 ////

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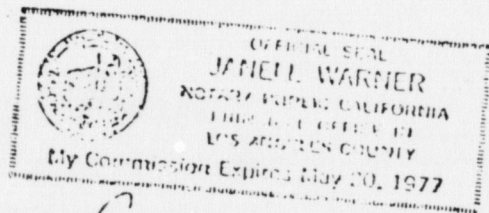
COMPLAINT IN MASSACHUSETTS ACTION

7. And, for such other and further relief as the Court may deem to be just and proper.

The Plaintiffs

By Harold A. Lipton  
Harold A. Lipton

Then personally appeared before me in Beverly Hills, California, on the 25th day of September, 1974, the plaintiff HAROLD A. LIPTON and made oath that he has read the foregoing complaint and that the facts stated therein are true of his own knowledge, except those statements of law which he has been advised by his attorneys are correct and those facts alleged on information and belief which he believes to be true, and thereafter signed same.



Janell Warner  
Notary Public

My Commission Expires: May 20, 1977

of Counsel:

Stuart A. Benjamin  
Stuart A. Benjamin  
WYMAN, BAUTZER, ROTHMAN & KUCHEL  
9601 Wilshire Boulevard  
Beverly Hills, California 90210  
(213) 273-1000  
Attorneys for the Plaintiffs

Herbert Weissblum  
Herbert Weissblum  
COHN, RIEMER & POLLACK  
15 Court Square  
Boston, Massachusetts 02108  
(617) 523-9000  
Attorneys for the Plaintiffs

EXHIBIT A - NEWS CLIPPING - ANNEXED TO COMPLAINT  
IN MASSACHUSETTS ACTION

*Qatar Herald*  
*July 24, 1974*

## Celtics' Schmertz Loses 4.2M Breach of Contract Suit

LOS ANGELES (AP)—A federal court jury has awarded \$4.2 million in damages to two men in their breach of contract suit against Celtics' owner Bob Schmertz in connection with the sale of the National Basketball Association team in 1972, it was disclosed yesterday. *HERALD JUL 24 '74*

The jury voted in favor of Harold Lipton and Irving Levine, who were forced by the league to sell the team after they purchased it for \$3.7 million in April 1972.

The NBA Board of Governors refused to approve their purchase because Lipton and Levine were both officers of National General Corp., a company of which Seattle Super-Sonics owner Sam Schulman is an officer.

Lipton and Levine are no longer associated with National General, attorneys said.

According to court records, Lipton and Levine sold the team to Schmertz in May 1972 for the same price they would have paid for it.

In their suit against Schmertz, Lipton and Levine contended that terms of the sale included an option for the two to buy back 50 per cent of the Celtics within a year.

The action claimed Schmertz refused to allow Lipton and Levine to repurchase any part of the Celtics.

After the jury verdict Monday, U.S. Dist. Court Judge Manuel Real ordered Schmertz to appear Sept. 9 for a contempt hearing on grounds he ignored a court order to appear at the trial of the lawsuit against him.

Schmertz was unavailable for comment.

EXHIBIT B - CERTIFICATION OF AMENDED JUDGMENT -  
ANNEXED TO COMPLAINT IN  
MASSACHUSETTS ACTION

United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION FILE NO. 73-1303-R

HAROLD A. LIPTON and  
IRVING H. LEVIN,

vs.

Plaintiffs,

ROBERT J. SCHMERTZ,

Defendant.

JUDGMENT

CERTIFICATION OF JUDGMENT FOR  
REGISTRATION IN ANOTHER DISTRICT

I, EDWARD M. KRITZMAN, Clerk of the United States District Court for  
the Central District of California,  
do hereby certify the annexed to be a true and correct copy of the original <sup>amended</sup> judgment entered in the  
above entitled action on August 28, 1974, as it appears of record in my office,  
and that

• a notice of appeal from judgment was filed in my office on  
August 12, 1974. To date no stay of execution of said judgment  
has been filed or entered.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said  
Court this 25th day of September, 1974.

By Edward M. Kritzman, Clerk  
Deputy Clerk

\* When no notice of appeal from the judgment has been filed, insert "no notice of appeal from the said judgment has been filed in my office and the time for appeal commenced to run on [insert date] upon the entry of [If no motion of the character described in Rule 73(a) F.R.C.P. was filed, here insert 'the judgment', otherwise describe the nature of the order from the entry of which time for appeal is computed under that rule.] If an appeal was taken, insert "a notice of appeal from the said judgment was filed in my office on [insert date] and the judgment was affirmed by mandate of the Court of Appeals issued [insert date]" or "a notice of appeal from the said judgment was filed in my office on [insert date] and the appeal was dismissed by the [insert 'Court of Appeals' or 'District Court'] on [insert date]", as the case may be.

EXHIBIT C - AMENDED JUDGMENT ON THE VERDICT -  
ANNEXED TO COMPLAINT IN  
MASSACHUSETTS ACTION

STUART A. BENJAMIN  
A Member of the

LAW OFFICES OF  
WYMAN, DAVENPORT, BENJAMIN & EUGENE  
9601 WILSHIRE BOULEVARD, SUITE 726  
BEVERLY HILLS, CALIFORNIA 90210  
CHENVIEW 3-1000 - TREMONT 8-1000

Attorneys for Plaintiffs

AUG 28 1974

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BY

*[Signature]*

DEPUTY

*CB*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

AUG 28 7 11

CLERK, U. S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
*[Signature]*  
Dep

HAROLD A. LIPTON and  
IRVING H. LEVIN,

Plaintiffs,

vs.

ROBERT J. SCHMERTZ,

Defendant.

CASE NO. 73-1303-R

AMENDED JUDGMENT  
ON THE VERDICT

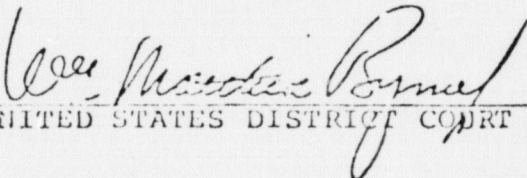
EXHIBIT C - AMENDED JUDGMENT ON THE VERDICT -  
ANNEXED TO COMPLAINT IN  
MASSACHUSETTS ACTION

This case having been tried before the Honorable Manuel L. Real, and the issues having been duly tried, and the jury having rendered its verdict, and a JUDGMENT ON THE VERDICT (FOR PLAINTIFFS) having been entered on July 25, 1974 in favor of the plaintiffs, HAROLD A. LIPTON and IRVING H. LEVIN, and against the defendant, ROBERT J. SCHMERTZ, in the sum of \$3,719,232.87 compensatory damages, and in the sum of \$500,000 punitive damages, and plaintiffs having filed a written consent to reduce said verdict to \$3,435,000 compensatory damages, plus \$500,000 punitive damages, and said consent having been duly signed, acknowledged and filed with the Clerk of the Court; now, therefore, pursuant to the verdict, and pursuant to said consent to reduce verdict,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the JUDGMENT ON THE VERDICT (FOR PLAINTIFFS) be and hereby is amended and that pursuant to said amendment, defendant, ROBERT J. SCHMERTZ pay to plaintiffs, HAROLD A. LIPTON and IRVING H. LEVIN, compensatory damages in the sum of \$3,435,000; and that defendant, ROBERT J. SCHMERTZ, pay to plaintiffs, HAROLD A. LIPTON and IRVING H. LEVIN, punitive damages in the sum of \$500,000.

EXHIBIT C - AMENDED JUDGMENT ON THE VERDICT -  
ANNEXED TO COMPLAINT IN  
MASSACHUSETTS ACTION

IT IS FURTHER ORDERED, ADJUDGED AND DECREED  
that said plaintiffs, HAROLD A. LIPTON and IRVING H.  
LEVIN, have and recover costs from defendant, ROBERT  
J. SCHMERTZ, as entered on the judgment of July 25,  
1974, taxed in the sum of \$1,814.70.  
Dated: August 26, 1974.

  
UNITED STATES DISTRICT COURT JUDGE

SUMMONS AND ORDER OF NOTICE WITH  
TEMPORARY RESTRAINING ORDER

Court, County & District:

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION

No. 2002

A.

HAROLD JETCO, ET AL, Plff(s).

v.

ROBERT J. SCHLETTZ, ET AL, Deft(s).

SUMMONS  
(Mass. R. Civ. P. 4)  
AND  
ORDER OF NOTICE  
WITH  
TEMPORARY RESTRAINING ORDER

7/14

SUMMONS AND ORDER OF NOTICE WITH  
TEMPORARY RESTRAINING ORDER

Commonwealth of Massachusetts

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION

No. 2002

A.  
HAROLD LIPTON, ET AL

, Plaintiff(s)

v.

ROBERT J. SCHERETZ, ET AL

, Defendant(s)

SUMMONS AND RESTRAINING ORDER

To the ~~above named~~ Defendants: ROBERT J. SCHERETZ, FIRST NATIONAL BANK OF BOSTON, and  
BOSTON CELTICS BASKETBALL CLUB, INC.

You are hereby summoned and required to serve upon Herbert Weissblum,  
Cohn, Ricner & Pollack,  
plaintiff's attorney, whose address is 15 Court Sq., Boston, Mass. 02108, an answer to  
the complaint which is herewith served upon you, within 20 days after service of this summons upon  
you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you  
for the relief demanded in the complaint. You are also required to file your answer to the complaint in  
the office of the Clerk of this court at Boston either before service upon plaintiff's attorney or within a  
reasonable time thereafter.

Unless otherwise provided by Rule 13(a), your answer must state as a counterclaim any claim which  
you may have against the plaintiff which arises out of the transaction or occurrence that is the subject  
matter of the plaintiff's claim or you will thereafter be barred from making such claim in any other  
action.

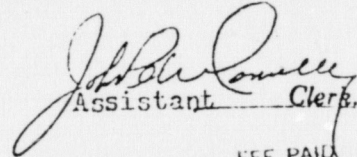
WE ALSO NOTIFY YOU that application has been made in said action, as appears in the  
complaint, for a preliminary injunction and that a hearing upon such application will be held at the court  
house at said Boston in the First session without jury of our said court on Thursday the  
tenth day of October A.D. 19 71 at 10 o'clock A.M., at which  
you may appear and show cause why such application should not be granted.

SUMMONS AND ORDER OF NOTICE WITH  
TEMPORARY RESTRAINING ORDER

In the meantime, until such hearing, WE COMMAND YOU, said First National Bank of Boston and your agents, <sup>servants</sup>attorneys and counsellors, and each and every one of them, to desist and refrain from selling, transferring, further encumbering or otherwise disposing of or alienating the shares of stock in your custody and belonging to the defendant Robert J. Schmertz in and to the Boston Celtics Basketball Club, Inc., Leisure Technology Corporation and New England Professional Hockey, Inc., d/b/a New England Whalers.

In the meantime, until such hearing, WE COMMAND YOU, said Boston Celtics Basketball Club, Inc., and your agents, servants, attorneys and counsellors, and each and every one of them, to desist and refrain from transferring, encumbering, or, in any way, alienating the stock of your corporation which, on your books and records, is owned by the defendant Robert J. Schmertz, and all or substantially all of the assets owned by you.

In the meantime, until such hearing, WE COMMAND YOU, said Robert J. Schmertz, and your agents, servants, attorneys and counsellors, and each and every one of them, to desist and refrain from selling, transferring, further encumbering or, in any other way, disposing of or alienating your capital stock in and to the Boston Celtics Basketball Club, Inc., Leisure Technology Corporation and New England Professional Hockey, Inc., d/b/a New England Whalers, and all or substantially all of the assets owned by the Boston Celtics Basketball Club, Inc. and New England Professional Hockey, Inc.

  
Assistant Clerk

LEE PAID  
1 mms.  
9-30-74

NOTES.

1. This summons is issued pursuant to Rule 4 of the Massachusetts Rules of Civil Procedure.
2. When more than one defendant is involved, the names of all defendants should appear in the caption. If a separate summons is used for each defendant, each should be addressed to the particular defendant.

PLAINTIFFS' COUNSEL'S AFFIDAVIT  
IN THE MASSACHUSETTS ACTION

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO.

2002

\* \* \* \* \*

HAROLD A. LIPTON, et al \*

Plaintiffs \*

vs. \*

ROBERT J. SCHMERTZ, et ali \*

Defendants \*

\* \* \* \* \*

AFFIDAVIT OF  
HERBERT WEISSBLUM

A F F I D A V I T

EVENTS CAUSING IMMEDIATE AND IRREPARABLE LOSS

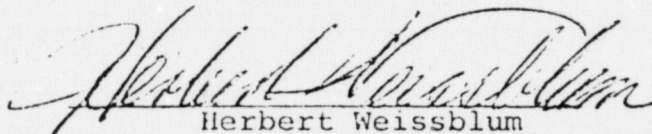
I, HERBERT WEISSBLUM, being duly sworn, depose and say as follows:

1. I am counsel to the plaintiffs in this action and am a member of the Massachusetts Bar, admitted to practice before the state and federal courts in the Commonwealth since 1960.
2. The plaintiffs recovered a judgment with costs and interest against the defendant SCHMERTZ in the United States District Court for the Central District of California July 25, 1974, in the sum of \$4,221,047.57, subsequently reduced to \$3,936,814.70 on remittitur, which Judgment has not been stayed pending appeal.
3. The parties, through their counsel, have been negotiating since the entry of said judgment to see ways to satisfy same, or alternatively, to collateralize same pending defendant's appeal; and, upon reliable information and belief, the defendant has been during this time bargaining with others to sell his assets, which, if not the actual intent, is serving

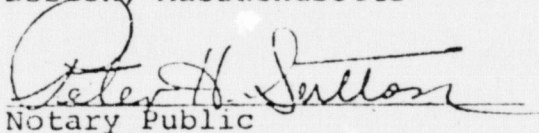
PLAINTIFFS' COUNSEL'S AFFIDAVIT  
IN THE MASSACHUSETTS ACTION

as a practical matter to divest the defendant of his assets in such a manner as to hinder, defeat and delay the plaintiffs' attempts to collect, and the collection of, this judgment against the defendant.

4. In the past week SCHMERTZ has sold his stock interest in two professional athletic organizations as has been reported in newspapers and other news media, an example of which are copies of two articles from "The Boston Globe" of Thursday, September 26, 1974, and Friday, September 27, 1974, partially attached hereto.

  
Herbert Weissblum

Sworn to and subscribed  
before me on this 28th day  
of September, 1974, at  
Boston, Massachusetts

  
Notary Public

My Commission Expires: 7/3/81

The Boston Globe Thursday, September 26, 1974 55

# SPORTS

RAY FITZGERALD

## Upton at last his own boss



59

Employees of the Jacksonville Sharks were paid yesterday for the first time since Sept. 2. The Detroit Wheels are flatter than a working man's wallet on Thursday afternoon.

The Florida Blazers are a step and-a-half ahead of the sheriff and his dogs. The Hawaiians are about as popular on the island as a three-day blizzard.

The Houston Texans are now the Shreveport Steamer, as perfect an example of the old saying that crabgrass by any other name is still crabgrass.

Into this financial valley of death yesterday rode Upton Bell, boy mogul, galloping along on his horse, Optimism, checkbook tilted at the world.

The former Patriots general manager took over the New York Stars franchise and has moved it, lock, stock, and Parilli, to beautiful downtown Charlotte, N.C.

Bell relieved Robert ("I love Boston, call me Bob") Schmertz, the fading entrepreneur who has now divested himself of two fledgling franchises—the Stars and the WHA Whalers.



UPTON BELL

Schmertz is left with the Celtics, and vice versa, and if I were a Celtics fan, I would not consider their financial status as stable as nor equal to Nelson Rockefeller's dog food budget.

Howard Baldwin, the outgoing president of the Stars, said the team lost \$2 million. Baldwin thus holds a record for being involved with two differ-

ent teams losing \$2 million each in consecutive years. That's what the Whalers claimed when they left for the balmy climes of Hartford, Conn.

## WFL departs New York

The WFL continued its move from big cities yesterday as the New York Stars shifted to Charlotte, N.C.

Boston Globe Friday, September 27, 1974

## Bell sells his Stars well

The Stars fell on North Carolina Wednesday night and, if early enthusiasm is any indication, Upton Bell may have a winner on his hands.

The former Patriots general manager set up a temporary office in a Charlotte motel Wednesday night shortly after announcing the move of the New York WFL football team to that city. He sold 2000 tickets to the Stars "home opener" Oct. 9th at Charlotte's 24,000-seat Memorial Stadium between 5 and 11 p.m.

"We could have put 10 more people on, handling ticket requests," said Bell, who did just that yesterday.

Stymied by repeated telephone busy signals, lines of fans formed outside the motel yesterday morning.

Bell's success, however, has not been shared with former Patriot Rommie Loudd, general manager of the financially troubled Florida Blazers of that league.

Loudd, trying to shift his franchise from Orlando, Fla. to Atlanta, ran into another wall of interference yesterday when he was turned down by the Georgia Tech Athletic Assn. in his attempt to lease that school's Grant Field for Blazers' games on Oct. 23 and 30.

EXHIBIT A - ORDER OF NINTH CIRCUIT COURT OF APPEALS -  
ANNEXED TO DEFENDANT'S MEMORANDUM OF LAW

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

F I L E D

SEP 25 1974

CLERK  
U.S. COURT OF APPEALS

HAROLD A. LIPTON and IRVING  
H. LEVIN,

Docketed

Plaintiffs-Appellees,

No. 74-2522

vs.

ROBERT J. SCHMERTZ,

O R D E R

Defendant-Appellant.

Before: MERRILL and WRIGHT, Circuit Judges

Upon consideration of appellant's supplement to the pending petition for rehearing, the matter of the adequacy of the form of security offered to stay the execution of judgment is remanded to the district court for further consideration.

s/ illegible

U. S. CIRCUIT JUDGES

No Cal 8/19/74

EXHIBIT B - AFFIDAVIT OF ROBERT J. SCHMERTZ  
SWORN TO AUGUST 8, 1974 - ANNEXED  
TO DEFENDANT'S MEMORANDUM OF LAW

COLEMAN & O'CONNELL  
Attorneys at Law  
1801 Avenue of the Stars, Suite 810  
Los Angeles, California 90067

GIORDANO, HALLERAN & MCOMBER  
Post Office Box 190  
270 State Highway 35  
Middletown, New Jersey 07748  
Attorneys for Defendant

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HAROLD A. LIPTON and	)	
IRVING H. LEVIN,	)	
	)	
Plaintiffs,	)	No. 73-1303-R
	)	
vs.	)	
	)	
ROBERT J. SCHMERTZ,	)	
	)	
Defendant.	)	
_____	)	

STATE OF NEW JERSEY	)	
	)	ss.
COUNTY OF OCEAN	)	

I, ROBERT J. SCHMERTZ, being first duly  
sworn, say:

1. I am a resident of the State of New  
Jersey and defendant in the above entitled case.  
My principal occupation is Chairman of the board,

EXHIBIT B - AFFIDAVIT OF ROBERT J. SCHMERTZ  
SWORN TO AUGUST 8, 1974 - ANNEXED  
TO DEFENDANT'S MEMORANDUM OF LAW

President and chief operating officer of Leisure Technology Corporation, a company which I founded.

2. Approximately in 1952, I founded a predecessor company, Pine Acres, Inc., which was in the business of construction of low cost housing. That business grew into another construction company, Robilt, Inc., and finally in approximately 1967 I formed Leisure Technology Corporation, whose principal business has come to be the construction of retirement communities. It has constructed or has under construction more retirement communities than any other company in the United States.

3. Leisure Technology is a publicly held company with approximately 3.5 million shares of stock outstanding. It is traded on the American Stock Exchange. There are approximately 2,000 stockholders of Leisure Technology Corporation among the general public. I personally own approximately 2 million shares or approximately 55% of the stock of the company. Such shares are letter stock and are presently pledged to the First National Bank of Boston as partial security for the 4 million dollar loan with which I acquired the Boston Celtics and

EXHIBIT B - AFFIDAVIT OF ROBERT J. SCHMERTZ  
SWORN TO AUGUST 8, 1974 - ANNEXED  
TO DEFENDANT'S MEMORANDUM OF LAW

as partial security as well for a loan of \$1,980,000 to the New England Whalers, a World Hockey League team, of which I own 60% of the outstanding stock.

4. Among the retirement communities constructed by Leisure Technology Corporation are:

Leisure Village at Lakewood, New Jersey

Leisure Village East, Lakewood, New Jersey

Among retirement communities presently being constructed and partially occupied are the following:

Leisure Village, Camarillo, California

Leisure Village West, Manchester, New Jersey

Leisure Village Long Island, Brookhaven, Long Island, N.Y.

Leisure Village, Fox Lake, Illinois

Leisure Town, Vincentown, New Jersey

Leisure Knoll, Manchester, New Jersey

Leisure Knoll, Brookhaven, Long Island, N.Y.

Vacation Village, Stroudsburg, Pennsylvania

Vacation Village, Fox Lake, Illinois

Seven Lakes, Fort Meyers, Florida

5. While the communities are open to anyone who is retired from the age of 55 on, most of the

EXHIBIT B - AFFIDAVIT OF ROBERT J. SCHMERTZ  
SWORN TO AUGUST 8, 1974 - ANNEXED  
TO DEFENDANT'S MEMORANDUM OF LAW

occupants of these communities are 65 years of age or older. At present, there are approximately 15-20,000 elderly residents of the foregoing communities.

6. While the communities are being constructed, Leisure Technology Corporation subsidizes the community center facilities, including recreational centers, craft shops, theatres, golf courses and swimming pools. When construction is completed and occupancy is more than 2/3 full, Leisure Technology Corporation turns over the operation of the common community facilities to the community itself. However, in each of the instances of the uncompleted partially occupied communities, Leisure Technology Corporation at present is subsidizing and operating the aforesaid community facilities.

7. Leisure Technology Corporation is presently indebted to various financial institutions in the sum of \$45 million. In addition, there are various land mortgages on properties which are not yet under construction where Leisure Technology Corporation is also in debt to various financial institutions.

EXHIBIT B - AFFIDAVIT OF ROBERT J. SCHMERTZ  
SWORN TO AUGUST 8, 1974 - ANNEXED  
TO DEFENDANT'S MEMORANDUM OF LAW

8. On Monday, July 22, 1974, I was informed that the jury had returned a verdict in the above entitled case in the sum of 4.2 million dollars against me. I am informed and believe that I have valid grounds for appeal of that judgment and that a reversal of that judgment is likely if those grounds are presented to the Court of Appeals.

9. Since Tuesday, July 23, 1974, I have made efforts to obtain security to post with the Court during the pendency of the appeal. Those efforts are delineated below.

10. In an effort to obtain a bond to post with the Court pending the appeal, I telephoned two insurance agencies in New Jersey. I spoke with Mr. Peter Boyarin of the Boyarin Agency in Jackson, New Jersey, and asked him to secure such a bond for me. He later reported to me that based upon my financial position the bonding companies whom he contacted would not write a bond in the amount of 4.2 million dollars for me. He told me each company demanded liquid collateral in that amount not presently pledged to other financial institutions. I do not have

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such liquid unencumbered assets. Mr. Boyarin told me that he had received such refusals from the Hartford Insurance Group, the Peerless Insurance Company, and CNA.

11. I also spoke with Mr. Leonard Cohen and Mr. William Weber of the Madison Agency in Lakewood, New Jersey and made the same request of them as I had with Mr. Boyarin. They subsequently told me that the bonding companies they had contacted would not write such a bond without liquid collateral in amounts which I could not provide. Mr. William Weber told me that he had had such a reply from Firemen's Fund, INA and Chubb & Sons.

12. Additionally, I have caused my accountants to provide financial statements to representatives of the Insurance Company of North America (INA), and I have been informed that INA refused to write such a bond because my principal assets are already pledged as collateral on other bank loans.

13. I spoke in person to Mr. Ernest Bencivenga, President of the First State Bank of Ocean County, a bank with which I have previously

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done business and of which I am a member of the Board of Directors. I asked Mr. Bencivenga for a letter of credit which I would post as collateral with the bonding company or directly with the Court as a bond pending appeal. Mr. Bencivenga refused my request and said that the bank could not grant me such a letter of credit based upon my present financial status either by itself alone or on a participatory arrangement with other banks.

14. I telephoned and spoke with Mr. Edward Denby, President of the Broadway National Bank of Bayonne, New Jersey, again a bank with which I have previously done business. I made the same request of Mr. Denby that I had made of Mr. Bencivenga, and I received the same reply.

15. I telephoned Charles Remaley, Vice President of the Morgan Guaranty Bank of New York, another bank with which I have previously done business. I made the same request of him that I had made of Messrs. Bencivenga and Denby and I received the same reply.

16. I telephoned Mr. Chad Gifford, Loan Officer of the First National Bank of Boston. I have

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previously done business with the First National Bank of Boston. In fact, I obtained a 4 million dollar loan with which to purchase the Boston Celtics from that bank. I also own 60% of the New England Whalers, a World Hockey League team, and the Whalers have a loan from the First National Bank of Boston of \$1,980,000. As collateral for the Celtics loan, the bank holds 100% of the stock of the Celtics Basketball Club. As collateral for the Whalers loan, the bank holds my stock in the Whalers. Additionally, the bank holds all of my shares (approximately 2 million) of letter stock in Leisure Technology to secure both loans.

I asked Mr. Gifford if he would either release my Leisure Technology stock as collateral for the loans or give me a letter of credit that I might use as either collateral to obtain a bond or to post directly with the Court. Mr. Gifford called me back and told me that the First National Bank had refused both my requests.

17. In addition to my ownership of Leisure Technology stock, the Boston Celtics stock and 60% of the New England Whalers stock, I also own 100% of the

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stock in the New York Stars. The Stars are a football team in the newly organized World Football League. My cash investment in the Stars was \$5,000. The World Football League is in its second month of play. The Stars are suffering heavy financial losses. I have already lent the Stars \$100,000 and the Stars additionally have borrowed \$400,000 from Morgan Guaranty Bank for which I have pledged as collateral my interest in a cooperative apartment house in New York City, plus a note owed to me from the Portland Basketball Club. The Stars are presently playing their games at Randall's Island, New York, which Stadium I believe has the smallest seating capacity of any team in the World Football League. Based upon the four games played to date and my experience in the sports business, it is my opinion that the New York Stars will not be a money making team for at least 3 years.

18. My remaining unencumbered assets do not exceed \$900,000 in value.

19. I am ready and willing to secure the judgment in the instant case during the pendency of the appeal by giving a second lien on the stock of the Boston Celtics for that time period (the stock is

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presently held by the First National Bank of Boston as partial collateral for the 4 million dollar loan with which I purchased the Boston Celtics). Since the instant litigation involves alleged promises to give the plaintiffs an option to purchase one-half the Celtics at one-half my cost including \$250,000 to plaintiffs and since the 4 million dollar loan was known to the plaintiffs to be part of my cost, I believe that the plaintiffs would be totally secure in the premises of the suit with such a second lien during the pendency of the appeal.

20. If forced to obtain a bond or to deposit money in a sum equal to the 4.2 million dollar judgment, I would be forced to undergo a distress sale type of liquidation of assets. My principal assets would be my stock in the Boston Celtics and my stock in Leisure Technology. To be able to liquidate those assets it would be necessary for me to repay the First National Bank of Boston the sum of 4 million dollars, plus the \$1,980,000 loan to the New England Whalers.

I know from my own personal experience that basketball teams are not readily saleable assets. Before I purchased the Boston Celtics, I know that

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the Celtics were on the market for approximately eight months. That purchase two years ago was in the amount of approximately 4.6 million dollars, of which 3.7 million was in cash. Further, I know from my years in business that distress sales seldom bring anything near the real value of the asset. Further, the New England Whalers have not made money as a hockey team since their inception. The World Hockey League has only been in operation two years and to my knowledge no team in the League has made money.

Thus, in my opinion, it is likely that a distress sale of the Whalers and the Celtics would not bring sufficient cash to pay off the First National Bank of Boston's \$5,980,000 outstanding loans. Thus, it would be necessary for me to sell my Leisure Technology stock as well in order to complete the repayment to the First National Bank of Boston and begin to accumulate the money necessary to meet a bond in the sum of 4.2 million dollars.

21. Leisure Technology stock has been at a high of \$36 a share in the early 1970's and at a low of \$1 7/8 since then. Presently it is selling in the range of \$2 1/4 to \$2 1/2 per share. My stock

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is lette stock which the market place normally discounts by at least 40%. Based upon my years of experience as a businessman, I believe that attempting to sell such an enormous block of stock would result in prices substantially below 50% of the current market.

22. Additionally, it is my judgment that such an action would inevitably depress the market to a new low for the stock, damaging the approximately 2,000 members of the general public who hold the stock.

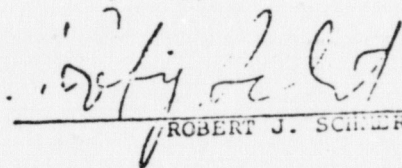
23. Further, without the stock I would lose control of the company which, considering its predecessor companies, I have spent over 20 years in building. There would be as well an unknown and disruptive impact upon the management and continuity of operations of the company affecting the ten residential communities presently partially occupied where Leisure Technology is completing construction and subsidizing community center operations. This is so due to provisions in the 45 million dollar loan agreement (see para. 7 supra). That agreement specifically states that if, for any reason, I cease

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to be President of Leisure Technology and Chairman  
of the Board, the loan shall be in default and the  
financial institutions may terminate the loans.

24. If called as a witness, I could and  
would testify to the foregoing.

Executed on August 8, 1974, at Lakewood,  
New Jersey.

  
\_\_\_\_\_  
ROBERT J. SCHMERTZ

Subscribed and sworn to  
before me on August 8<sup>th</sup>, 1974.

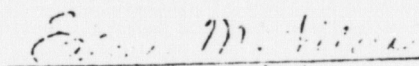
  
\_\_\_\_\_  
Notary Public  
ELLEN M. WILSON  
NOTARY PUBLIC OF NEW JERSEY  
My Comm. Exp. 12/31/75

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Attorneys for Defendant-Appellant

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HAROLD A. LIPTON and	)	
IRVING H. LEVIN,	)	
	)	No. 74-2522
Plaintiffs-Appellees,	)	
	)	
vs.	)	
	)	
ROBERT J. SCHMERTZ,	)	
	)	
Defendant-Appellant.	)	
_____	)	

STATE OF CALIFORNIA )  
 )  
COUNTY OF LOS ANGELES )

I, Robert J. Schmertz, being first duly  
sworn, declare and say:

1. I am the defendant-appellant in the  
above-entitled case.

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2. I am President, Chairman of the Board and chief operating officer of Leisure Technology Corporation. The present book value of said stock is approximately \$7.60 per share, substantially above current market prices.

3. On Thursday, August 8, 1974, and Friday, August 9, 1974, I had discussions with Chad Gifford, Loan Officer of the First National Bank of Boston (hereinafter "Bank"), regarding securing the judgment in the above-entitled case pending appeal with a second lien on my stock in the Boston Celtics Basketball Club, presently held by the Bank as collateral for the loan of four million dollars by which the Celtics were purchased.

Mr. Gifford, on behalf of the Bank, informed me that the Bank will agree to recognize such a second lien in favor of plaintiffs-appellees on said stock.

4. A news story attributed to the New York Post appeared nationally on August 16, 1974 stating that I had sold the New York Stars football team in the World Football League for 6 million dollars and that my investment in the club had been 2.5 million dollars, giving me a profit of 3.5 million dollars.

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The story is untrue in all particulars. I have not sold the New York Stars although I have attempted to do so. At present, negotiations concerning the possible sale of the New York Stars involve amounts which (assuming that all items of negotiation were resolved in my favor) would result in a profit to me of less than two hundred fifty thousand dollars (\$250,000). There is no assurance that such a sale will be consummated.

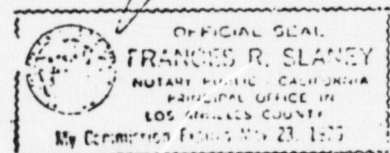
5. If called as a witness, I could and would testify to the foregoing.

Executed on August 16, 1974, at Los Angeles, California.

Subscribed and sworn to before  
me this 16th day of August 1974:

*Frances R. Slaney*  
Notary Public in and for  
said County and State

*Robert J. Schmertz*  
Robert J. Schmertz



*Copy Received*  
*Robert P. Herzog*

ROBERT P. HERZOG  
185 Madison Avenue  
New York, N. Y. 10016

*Oct. 16, 1974 @ 12 PM.*